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EXHIBIT 1
DATE 3-23-2009
SB SB 349

March 13, 2009

Senator Bruce Tutvedt
2335 W. Valley Drive
Kalispell, Montana 59901

Dear Senator Tutvedt:

I am writing in response to your request for an opinion as to the constitutionality of Senate Bill No. 349. Senate Bill No. 349 provides that certain confidential or proprietary information submitted as part of the public bidding or public contracting process for certain public building and public highway, road, and similar transportation projects is not public information open to public inspection.

Senate Bill No. 349 amends section 18-4-126, MCA, to provide that procurement information that is identified as a trade secret, as defined in section 30-14-402, MCA, or that is confidential or proprietary, including business plans, marketing plans or strategies, customer lists, contracts, sales data, revenue, or other financial information, is not a public writing and may not be made available to the public if the information: (a) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and (b) is identified by the person submitting the information as a trade secret or proprietary information.

It is important to note that the information described in Senate Bill No. 349 is not used in awarding a bid or contract, but is apparently required to be submitted by certain agencies for use in the event of a claim under the contract. The propriety of requiring the submission of this information at the bidding stage is questionable. In Great Falls Tribune v. Montana Public Service Commission, 2003 MT 359, 319 Mont. 38, 82 P.3d 876 (2003), several media organizations sought access to power company documents filed with the Public Service Commission. Applying its administrative rules, the Commission evaluated the power company's claims of confidentiality against basic trade secret law, found that the company had met the initial burden of establishing trade secrets, and concluded that because the media had presented no evidence or argument to the contrary, the company information was entitled to constitutional protection as a matter of law. The Supreme Court disagreed, finding that to the extent that the Commission's rules relied on mere company representations that the information contained trade secrets, the Commission unconstitutionally shifted the initial burden of proof to the public to challenge the confidentiality claims, creating a presumption of confidentiality that directly conflicted with the public's right to view public records and the Commission's duty to make its records available to the public. The court held that a nonhuman entity seeking protective measures for alleged confidential materials filed with a governmental regulating agency must support its claim with a supporting affidavit making a prima facie showing that the materials constitute property rights that are protected by due process. Further, the showing must be more

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than conclusory and specific enough for the Commission, any objecting parties, and reviewing authorities to clearly understand the nature and basis of the confidentiality claim. The agency then must review the materials at the time of filing, in accordance with section 30-14-402(4)(b), MCA, and supporting case law, and make an independent determination whether the materials are in fact property rights entitled to due process protection. To the extent that Commission rules required less, the court directed revision of Commission rules to comport with this holding.

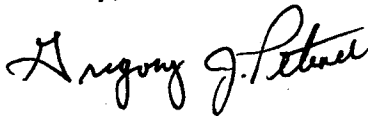
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Senate Bill No. 349 requires the entity submitting the bid to identify the material claimed as proprietary or as a trade secret. The identified information may not be made public if the information derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use. That determination will have to be made by the agency soliciting the bids and awarding the contract. That review comports with the holding in Great Falls Tribune. The only portion of the holding in Great Falls Tribune not embodied in Senate Bill No. 349 is the requirement for an affidavit supporting the making of a prima facie showing that the materials constitute property rights that are protected by due process. Senate Bill No. 349 requires the bidder to identify the material and provides the test for determining whether the material meets the test of trade secret or proprietary information constituting property rights. That requirement could be added to Senate Bill No. 349 or the agency requiring the submission of the information extraneous to the bidding process could require that the information be identified by supporting affidavit.

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I hope that I have adequately addressed your questions. If you have additional questions, please feel free to contact me.

Sincerely,



Gregory J. Petesch
Director of Legal Services

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